

Q: If a contract contains a rescission (“cooling off”) period, can I get my earnest money back if I cancel the contract during that time?

A: Probably; however, most purchase contracts do **not** have a rescission period. Only in certain kinds of transactions will you be allowed (for a limited time) to cancel the contract. These transactions include developer offerings of condominiums, time-shares, and interstate land sales; and where a seller fails to give you certain disclosures in a timely manner, including the *Residential Property Disclosure Statement* and, (for properties built before 1978) the lead-based paint disclosure. These rescission rights are usually created by state or federal law. The amount of time varies but is typically only a few days. You should consult your own attorney about rescission rights in such transactions.



Q: Isn't there a federal law that allows me to rescind my home loan and get my earnest money back?

A: No. Although there is a federal law that gives you three days to cancel a home loan commitment, it does not give you the right to cancel a purchase contract and get a refund of your earnest money. Your obligation to purchase as set forth in the sales contract is unrelated to your right to obtain the best possible loan or avoid a loan that has hidden condi-

tions. Even if the sales contract has a financing contingency clause (such as the one found in the standard *Offer to Purchase and Contract* form), your cancellation of an approved loan is not one of the conditions that would release you from the sales contract.

Q: Under the standard Offer to Purchase and Contract, do I get my earnest money back if the transaction does not close?

A: It depends on why the contract isn't consummated. For example, the standard contract typically includes various conditions and/or contingencies which must be met for the contract to proceed. These may include the requirement that you make a good faith effort to obtain necessary financing or to sell your own property; or that the seller make certain repairs and provide good title. If the seller does not meet his requirements, you may be entitled to a refund. On the other hand, if you breach the contract, you may forfeit the earnest money deposit. The party injured by the breach may also seek additional damages or try to enforce the contract by asking for “specific performance” where a court is asked to compel the breaching party to perform their promise—either to purchase or to sell. If your purchase contract does not close, you should consult your attorney over the remedies that may be available.

Q: What if the contract fails and the seller and I cannot agree on who is entitled to the earnest money?

A: According to the terms of the standard *Offer to Purchase and Contract* and the rules governing real estate brokers, if there is a dispute between you and the seller over the return or forfeiture of an earnest money deposit, the broker holding the money must continue to hold the funds in trust until you and the

seller resolve the dispute in writing or until a court decides the matter (less than \$5000, Small Claims Court; more than \$5000, usually District or Superior Court although some cases may go to federal court). The parties may also resolve disputes through voluntary or court-ordered mediation. Alternatively, the broker holding the money may choose to pay the disputed funds to the Clerk of Court in the county where the property is located after first providing 90 days written notice to you and the seller. If the disputed funds are deposited with the Clerk of Court, you would have to initiate a special proceeding with the Clerk to recover the funds. If no one institutes a special proceeding within a year of the funds being deposited with the Clerk, it will be deemed unclaimed and delivered to the State Treasurer's Office as escheated funds.

If an attorney for you holds the earnest money, the attorney must hold or dispose of the funds in accordance with the rules of the North Carolina State Bar. When a form other than the standard *Offer to Purchase and Contract* is used, it may allow the seller access to the money whether or not the closing occurs as scheduled. In any event, while a broker is not allowed to pursue a claim for earnest money for you, the broker may appear as a witness in court.

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Questions and Answers on: EARNEST MONEY DEPOSITS

